Editor's Note: Reconsideration granted, Decision vacated in part by Order issued Nov. 30, 1998. See order at 143 IBLA 54 A through 54 G below.

AMOCO PRODUCTION CO.
EPEC OIL CO.
JICARILLA APACHE TRIBE, INTERVENOR

IBLA 97-214, 97-215 Decided February 19, 1998

Appeals from Decisions of the Deputy Commissioner of Indian Affairs requiring calculation of royalties on wet gas produced from Indian oil and gas leases on the basis of the higher value resulting from a dual accounting of the proceeds of sale of unprocessed wet gas and from the cumulative value of the products derived therefrom less a manufacturing allowance. MMS-88-0237-IND, MMS-88-0256-IND, MMS-88-0349-IND, MMS-89-0211-IND, and MMS-89-0338-IND.

Affirmed in part, reversed in part.

1. Indians: Mineral Resources: Oil and Gas: Tribal Lands--Oil and Gas Leases: Royalties: Natural Gas Liquid Products

   Dual accounting, a royalty valuation procedure in which the value of unprocessed (wet) gas is compared to the combined values of processed gas plus natural gas liquid products, less a manufacturing allowance, and royalty is paid on the higher value, was required as a general rule in valuation of wet gas production from Indian leases after the promulgation of NTL-1A in 1977.

2. Administrative Procedure: Rulemaking--Indians: Mineral Resources: Oil and Gas: Tribal Lands--Oil and Gas Leases: Royalties: Natural Gas Liquid Products--Regulations: Interpretation

   When it appears that prior to promulgation of NTL-1A, the Department interpreted the relevant Indian oil and gas lease terms and royalty valuation regulations not to require a dual accounting in the valuation of wet gas sold at arm's length at the wellhead, the dual accounting rule established by NTL-1A constituted an abrupt departure from prior practice, the lessee reasonably relied upon such practice, and the prejudice to the lessee from retroactive application of the rule outweighs the interest sought to be protected by the rule, a decision is properly reversed to the extent it applies the rule retroactively to a period prior to the effective date of the rule.

APPEARANCES: Charles L. Kaiser, Esq., and Charles A. Breer, Esq., Denver, Colorado, for Appellants; Howard W. Chalker, Esq., Peter J. Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, Washington, DC, for Minerals Management Service; Jill E. Grant, Esq., and Shenan R. Atcitty, Esq., Washington, DC, for Intervenor Jicarilla Apache Tribe.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Amoco Production Company and EPEC Oil Company (formerly Tenneco Oil Company) have appealed from Decisions of the Deputy Commissioner of Indian Affairs dated November 6, 1996, and November 5, 1996, respectively. The Decision issued to Amoco resulted from appeals of four separate Orders of the Minerals Management Service (MMS). A June 19, 1989, Order (MMS appeal docket No. MMS-89-0211-IND) directed Amoco to review its records for oil and gas leases on Indian lands from January 1970 for leases on Jicarilla Apache tribal lands, from January 1975 for leases on Shoshone and Arapaho tribal lands, and from January 1977 on all other Indian leases. The Order further required Amoco to calculate royalties on oil and gas production using a system of "dual accounting" 1/ and to report and pay any additional royalty due. Three 1988 Orders which directed Amoco to pay additional royalty on certain Indian oil and gas leases also involved the dual accounting issue (MMS appeal docket Nos. MMS-88-0237-IND, MMS-88-0256-IND, and MMS-88-0349-IND). Similarly, the Decision appealed by EPEC arose from an MMS Order dated September 26, 1989, requiring recalculation of the royalty obligation on all Indian leases which provide for dual accounting for the same time periods identified in the June 1989 Amoco Order.

Citing Notice to Lessees and Operators of Indian Oil and Gas Leases (NTL-1A), 42 Fed. Reg. 18135 (Apr. 5, 1977), the Deputy Commissioner held that the dual accounting requirement has been in effect throughout the time period relevant to these appeals. In support of her Decision, she cited the litigation in Jicarilla Apache Tribe v. Supron Energy Co., 728 F.2d 1555 (10th Cir. 1984) (Supron I), dissent adopted on rehrg. en banc, 782 F.2d 855 (1986), modified, 793 F.2d 1171 (1986), cert. denied 479 U.S. 970 (1986) (Supron II). On the basis of the decision of the majority on rehearing adopting the position of the dissent in Supron I, the Deputy Commissioner found that when choosing between two reasonable interpretations, the Department's trust responsibilities require it to apply the method of royalty calculation which provides the largest royalty, citing the dissent in Supron I, 728 F.2d at 1569. In response to concerns about retroactive application of royalty calculation procedures, the Deputy Commissioner held that even if it is assumed the Department had a different policy in effect for years, the Secretary, as trustee for the Indians,

1/ Dual accounting is described by the Deputy Commissioner's Decision as "a royalty valuation procedure whereby the value of unprocessed (wet) gas is compared to the combined values of processed gas plus natural gas liquid products (NGLP's), less a manufacturing allowance." (Decision of Nov. 6, 1996, at 3.)

is required to demand a dual accounting on Indian leases which authorizes dual accounting pursuant to the holding in the Supron case.

These appeals were consolidated for purposes of review by Order of the Board dated June 9, 1997, in view of the closely related legal issues. Subsequently, a Motion to Expedite Review of this case was granted by the Board in an Order dated November 25, 1997. Appellants' Statement of Reasons (SOR) for appeal characterizes the issue as whether the Department can retroactively require the lessees to calculate royalty for natural gas on the basis of a dual accounting 2/ regardless of longstanding policy and directives to the contrary. (SOR at 1.) Appellants contend that the retroactive imposition of the requirement to make a dual accounting for those Indian leases which contain certain language providing for payment of royalty "on the value of gas or casinghead gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater," is based on the court ruling in Supron II rather than the Department's directives with respect to dual accounting. (SOR at 3-4, n.6.) Appellants assert that the Department has discretion under the relevant statute, regulations, and lease terms to value gas produced from Indian leases in several ways and, during the relevant time period, that discretion was exercised in a way that did not require dual accounting under the circumstances of these appeals (arm's-length sale of gas at the wellhead), citing the 1985 "Issue Paper on Dual Accounting" approved January 17, 1985, by the Associate Director for Royalty Management, MMS. Id. at 12-13, Ex. 1.

Further, Appellants assert that when the royalty regulations were revised in 1988 they provided that dual accounting is required only when the lessee processes the gas itself or when the terms of the lease require it. Neither condition applies to the period at issue here, Appellants contend, as the gas was sold at the well head and the lease terms did not "require" a dual accounting, although they did authorize such an approach in the discretion of the Department. Id. at 15-16. It is argued by Appellants that the Department can change its royalty valuation directives prospectively, but not retroactively. Id. at 5. Further, Appellants contend that subsequent cases have eroded the significance of the decision in Supron II. Appellants also contend the MMS Orders are arbitrary and capricious because they depart from the Department's long-standing valuation policy with no explanation and require lessees to use data they cannot obtain.

2/ Dual accounting is defined by Appellants as "an accounting method which requires the royalty payor to calculate royalties, where gas is sold at the wellhead in arm's-length transactions and necessary information to perform the calculation is typically unavailable, on both (i) the value of the gas at the wellhead in its unprocessed state and (ii) the value of the liquids and residue gas remaining after processing." (SOR at 1.)

With respect to the retroactive application of the dual accounting requirement, Appellants contend that both the courts and this Board have held that when the Department instructs lessees to apply a different royalty valuation methodology, it does not have the authority to retroactively alter the way in which lessees are required to calculate royalties. Appellants assert that, in order to be sustainable, retroactive rulemaking by adjudication must satisfy the tests set forth in Retail, Wholesale & Dep't. Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972), requiring consideration of whether the case is one of first impression, whether the new rule represents an abrupt departure from established practice or merely an effort to fill a void in an unsettled area of the law, the extent to which the party against whom the new rule is applied relied upon the former rule, the burden which a retroactive rule imposes on a party, and the statutory interest in applying a new rule despite reliance of a party on the old rule. (SOR at 20.) Further, Appellants note that this analysis has been relied upon by this Board in deciding appeals involving the proper manner of calculating royalties. Sun Exploration & Production Co., 112 IBLA 373, 392 (1990). It is argued by Appellants that this standard has not been met in this case, the new rule is an abrupt departure from prior established directives, this is not a case of first impression, lessees relied upon the prior Departmental policy, retroactive dual accounting imposes a significant administrative and financial burden on lessees, 3/ and there is no compelling statutory interest that outweighs the adverse effects of retroactive application of the rule. (SOR at 21.)

Appellants assert that retroactive application of the dual accounting rule is not mandated by the Department's fiduciary obligation to Indians. Neither the lease terms nor the regulations require a dual accounting by lessees notwithstanding the fact that such a requirement could be imposed in the discretion of the Secretary, Appellants argue. Appellants contend that invocation of the fiduciary duty of the Secretary to Indians to support retroactive application of dual accounting despite the Secretary's discretion as to the method of royalty calculation based on the decision in Supron II must be rejected in light of a more recent decision of the Supreme Court. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). Further, Appellants assert that the fiduciary obligation of the Secretary to Indian lessors is subject to limitation where application of the fiduciary standard would entail an abuse of discretion, citing Woods Petroleum Corp. v. Department of the Interior, 47 F.3d 1032 (10th Cir. 1995). (SOR at 23.) Appellants assert that the Departmental decision is properly weighed under the arbitrary and capricious standard of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (1994), rather than a fiduciary

3/ Appellants assert that as they have no interest in the plant where the wet gas was processed, they are unable to obtain data needed to perform a dual accounting. Further, they contend that to the extent dual accounting calculations can be performed they require an "estimated 165 man-hours per lease to perform an exercise that will not result in significantly increased royalties." (SOR at 6; Ex. 4.)

standard, and that it was arbitrary and capricious to deviate from the established procedure retroactively. Id. at 26-27. Finally, Appellants contend that if any additional royalties are due, it would be unjust to charge late payment interest when the lessees were calculating and paying royalties in a manner specifically directed by the Department.

Counsel for MMS has filed an Answer in this case asserting that the relevant regulations, the terms of the leases at issue here, and NTL-1A all require dual accounting. Specifically, MMS cites language from the regulations to the effect that "royalty will be computed on the value of gas or casinghead gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater." 25 C.F.R. § 211.13 (1984). Counsel notes that the requirement for dual accounting for Indian leases was retained in the 1988 regulatory revision, citing 30 C.F.R. § 206.155(b) (1988). Thus, MMS contends that this case does not involve retroactive application of a revised rule requiring dual accounting. It is asserted that the regulations and lease terms were properly construed to require dual accounting, citing the Supron litigation. Counsel argues that the MMS Issue Paper, sent to MMS managers in January 1985, which purports to require dual accounting only when gas is not sold at arm's length and is processed, was not a rule, and, hence, could not override duly promulgated regulations. Further, MMS contends that the holding of the Supron litigation has not been overruled by subsequent decisions published in other litigation.

An Answer has also been filed in this case on behalf of the Jicarilla Apache Tribe. 4/ The Tribe contends that the language of the lease terms at issue requires a dual accounting. (Answer at 4.) Further, Intervenor asserts that similar language in the relevant regulations requires a dual accounting. Additionally, the Tribe argues that the terms of NTL-1A, which were promulgated through notice and comment rulemaking procedures, also require a dual accounting. The Tribe further contends that this requirement for dual accounting on Indian leases is retained in the 1988 regulatory revision. Additionally, Intervenor argues that the Department is under a fiduciary obligation under the terms of the Indian leases to require a dual accounting in order to ensure the highest possible royalties for the Indian lessors, citing the Supron litigation. Id. at 6-8. The Tribe contests Appellants' assertion that the holding in Supron II has been superseded by subsequent judicial decisions, distinguishing the Cotton and Woods cases on the ground that they do not deal with the impact of the fiduciary duty on application of the lease terms themselves and that the arbitrary and capricious standard does not replace the fiduciary standard in this matter. Intervenor also contends that the Secretary's discretion to specify the royalty valuation method does not alter the fiduciary duty to determine the value of production in the manner which will best protect the royalty interest of the lessor. The Tribe argues that documents such

4/ The Jicarilla Apache Tribe filed a Motion to Intervene in this case which was granted by Order of the Board dated May 2, 1997.

as the Issue Paper cited by Appellants were not promulgated by rulemaking and are not binding on either the Department or lessees. Id. at 15-16. Further, Intervenor asserts that the inconsistent policy statements issued by MMS do not rise to the level of a misrepresentation in an official document which can give rise to a claim of estoppel. Id. at 17.

The Tribe contends that this is not a case of first impression since the issue was decided adversely to Appellants in Supron II, and, further, that the MMS orders are not a departure from existing law as the relevant regulations and lease terms have long required dual accounting on Indian leases. (SOR at 21-22.) Further, it is asserted that Appellants' reliance on the Issue Paper and "other pre-Supron policy statements" was at lessees' risk in view of the pending litigation and that there is a statutory interest in maximizing returns on Indian leases. Hence, Intervenor contends that application of the balancing test cited by Appellants does not bar retroactive application of the dual accounting requirement. With respect to interest charges on late royalty payments, the Tribe asserts that this is required by terms of relevant statute. 30 U.S.C. § 1721(a) (1994).

It is conceded by the parties that section 3(c) of the lease terms obligated the lessee to pay:

> [A] royalty of 12-1/2 percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be royalty free. During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value. * * * It is understood that in determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casinghead gas, or on the products thereof (such as residue gas, natural gasoline, propane butane, etc.), whichever is the greater.

(Emphasis supplied.) The relevant regulations regarding valuation of oil and gas produced from Indian leases contain the same language. See 25 C.F.R. §§ 211.13 (tribal lands), 212.16 (allotted lands) (1987).

Provisions of NTL-1A, promulgated through notice and comment rulemaking procedures set forth in the APA 5/ and published in April 1977, were more specific as to the valuation of gas produced from Indian leases. In particular, NTL-1A required separate calculations of royalty on the basis of the value of the wet gas, the value of the separate components after processing less adjustment for a manufacturing allowance, and the gross proceeds accruing to the operator. 6/ Payment was required to be made on the basis of the method which yields the greatest royalty. NTL-1A, § III, 42 Fed. Reg. at 18137. 7/

As noted by Appellants, the above-quoted language of the lease provision and the relevant regulation provided the Secretary with discretion to utilize more than one method of valuation for gas produced from Indian leases. Notwithstanding the language of NTL-1A, it is clear that prior to the Supron litigation the general practice of the Department was not to require operators to perform a dual accounting when wet gas was sold at the wellhead under an arm's-length contract and the operator had no ownership interest in the processing plant where the components were separated. See Supron I, 728 F.2d at 1557-58; Wexpro Co., 106 IBLA 57, 69 (1988). Thus the Issue Paper on dual accounting signed by the Associate Director for Royalty Management in January 1985 confirmed the Department's former policy that dual accounting was not required for natural gas production from onshore leases sold at arm's length. See SOR, Ex. 1. 8/ The Jicarilla Apache Tribe initiated the Supron litigation in 1975 in an effort to change this situation.

The court in Supron II found that the broad statutory authority of the Secretary to administer Indian oil and gas leases gives rise to a fiduciary duty to the Indian lessors. 728 F.2d at 1565. In this context, the court held that when the Secretary faced a decision regarding proper application of the lease terms and the regulations to valuation of wet gas produced from Indian leases, his decision between reasonable alternatives must be based on the alternative which is in the best interests of the Indian tribe. Id. at 1567. Based on this finding, the court eschewed the standard APA administrative review analysis of whether the Secretary's decision

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5/ 5 U.S.C. § 553 (1994).

6/ An exception to this obligation to account in three ways was recognized when "the Supervisor has established that one of the * * * methods consistently yields the greatest royalty to the Indian lessor." 42 Fed. Reg. at 18137.

7/ In the preamble, Geological Survey described the principal differences between NTL-1A (governing Indian leases) and NTL-1 (governing onshore Federal leases), noting that royalty on Indian leases must be calculated by three methods "with payment being made on the method that yields the greatest royalty revenue." 42 Fed. Reg. at 18136.

8/ The Issue Paper stated a policy essentially consistent with that upheld as reasonable by the decision of the Tenth Circuit in Supron I, 728 F.2d at 1559, which was subsequently reversed on rehearing en banc in Supron II. 782 F.2d 855.

not to require dual accounting when wet gas was sold at arm's length at the wellhead and the operator had no interest in the processing plant was arbitrary and capricious in favor of considering whether the decision constitutes the reasonable alternative which best represents the interest of the Indians. Id. at 1566-67. Given the language of the lease terms, the relevant regulations, and NTL-1A, which support a dual accounting to ensure payment of royalty on the higher of the proceeds of sale of the wet gas or the value of the separate components of the wet gas (less a manufacturing allowance for liquid hydrocarbon products), the court upheld the trial court finding that the Secretary breached his fiduciary duty by failing to require a dual accounting. The MMS Decisions on appeal here were precipitated by the court's ruling.

[1] A threshold issue to be addressed in this appeal is whether the Decisions appealed herein constitute retroactive application of a rule developed through adjudicative rulemaking. Respondent MMS and the Tribe contend that this is not a case of adjudicative rulemaking because the regulations (and lease terms) always required a dual accounting. The terms of the lease and the relevant regulation at 25 C.F.R. § 211.13 (1987) certainly support imposition of a dual accounting requirement as held by the court in Supron II. As noted above, however, this was not the interpretation which the Department placed on the terms of the leases and the regulation in actual practice when administering these leases prior to the decision in Supron II. The Tribe and MMS also assert, however, that the dual accounting obligation was specifically required by rule when NTL-1A was promulgated by APA notice and comment rulemaking procedures in 1977. We find that a reading of NTL-1A discloses a rule announcing the exercise of the Secretary's discretion to require a dual accounting for wet gas produced from Indian oil and gas leases. While this rule was not codified in the Code of Federal Regulations, it was promulgated under APA notice and comment rulemaking requirements, and we find that it established the rule for valuation of wet gas production from Indian leases. See Notice to Lessees Numbered 5 Gas Royalty Act of 1987, Pub. L. No. 100-234, § 1(b)(5), 101 Stat. 1719 (1988) (Recognizing NTL-5 as a "duly promulgated regulation.") By its terms, NTL-1A provided that the royalty valuation procedure would be effective within 4 months of the effective date of NTL-1A, i.e., August 1, 1977. Accordingly, application of the dual accounting rule would not be retroactive rulemaking by adjudication as to royalty payments due from August 1, 1977. 9/ To the extent the MMS Decisions required payment of royalty due prior to that date under dual accounting requirements, they would involve retroactive application of the dual accounting rule.

9/ Appellants contend that dual accounting is not required pursuant to the 1988 regulatory revision. (SOR at 15-16.) This assertion is disputed by MMS, citing explicit recognition in the revised regulations that the requirement of accounting for comparison in the terms of Indian leases and the provisions of any settlement agreement between the Indian lessor and a lessee arising from administrative or judicial litigation will govern.

[2] With respect to the propriety of retroactive application of rules developed through adjudicative rulemaking, relevant considerations include:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale & Dep't. Store Union v. NLRB, 466 F.2d at 390; see Sun Exploration & Production Co., 112 IBLA 373, 97 Interior Dec. 1 (1990). With respect to application of dual accounting prior to August 1, 1977, we find that the rule represents a departure from well established practice in the Department. While the Issue Paper is discounted by MMS on appeal as a nonbinding internal memorandum which did not constitute a rule, it appears from the record that this did reflect the longstanding policy of the Department. Regardless of the questionable status of the Issue Paper after publication of NTL-1A, it was not an unreasonable interpretation of the lease terms and the contemporaneous regulations regarding calculation of royalty on Indian leases. It appears from the record that Appellants relied upon the former practice and that retroactive application of the dual accounting rule represents a very significant burden upon Appellants. Although the statutory interest in protecting the rights of Indians weighs in favor of retroactive application, we find that this factor is outweighed by the reliance which Appellants placed on the Department's policy and the burden associated with applying the rule retroactively prior to the effective date of NTL-1A provisions requiring dual accounting. While the trust responsibility of the Secretary guides the interpretation of the lease terms, this does not abrogate the rights of the lessees. See Woods Petroleum Corp. v. Department of the Interior, supra.

With respect to liability for late payment charges, we note that interest on royalty payments received after they are due is required by section 111(a) of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1721(a) (1994). We have been provided no authority for waiver of this statutory requirement. In any event, we find that adjudication of liability for late payment charges is premature in the absence of an assessment for such charges.

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fn. 9 (continued)
30 C.F.R. § 206.155(b) (1988). A subsequent 1996 regulatory revision separated valuation regulations for Indian oil and gas leases into 30 C.F.R. Part 206, Subpart E. 61 Fed. Reg. 5448 (Feb. 12, 1996). Explicit recognition of the requirement for dual accounting on certain Indian oil and gas leases is now recodified as 30 C.F.R. §§ 206.170(b), 206.175(b) (1996). We find that the 1988 and 1996 regulatory revisions retain the dual accounting requirement in the context of the leases at issue herein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed in part and reversed in part.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge

November 30, 1998

JICARILLA APACHE TRIBE (Intervenor)	:	Royalty
(ON RECONSIDERATION)	:	Petition for Reconsideration Granted; Decision cited as Amoco Production Co., 143 IBLA 45 (1998), Vacated in part; Decisions Appealed from Affirmed

ORDER

Amoco Production Company and Epec Oil Company have filed a Petition for Reconsideration of the Board's decision in the above-captioned appeals, cited as Amoco Production Co., 143 IBLA 45 (1998). In our decision, we affirmed in part and reversed in part decisions of the Deputy Commissioner of Indian Affairs affirming Minerals Management Service (MMS) orders requiring appellants to review their records for oil and gas leases on Indian lands from January 1970 for leases on Jicarilla Apache tribal lands, from January 1975 for leases on Shoshone and Arapaho tribal lands, and from January 1977 on all other Indian leases. The MMS orders further required lessees to calculate royalties on oil and gas production using a system of "dual accounting" 1/ and to report and pay any additional royalty due.

In essence, we held that although the terms of appellants' leases and the relevant regulations regarding valuation of oil

1/ Dual accounting is described by the Deputy Commissioner's Decision as "a royalty valuation procedure whereby the value of unprocessed (wet) gas is compared to the combined values of processed gas plus natural gas liquid products (NGLP's), less a manufacturing allowance." (Decision of Nov. 6, 1996, at 3.)

and gas on Indian leases for royalty purposes authorized imposition of a requirement to perform a dual accounting, they did not require such a procedure prior to promulgation of NTL-1A effective August 1, 1977. In view of the evidence that prior to August 1977 the lease terms and regulations were interpreted by the Department not to require dual accounting except in certain circumstances not present in these appeals, we found that "[t]o the extent the MMS Decisions required payment of royalty due prior to that date under dual accounting requirements, they would involve retroactive application of the dual accounting rule." 143 IBLA at 52. Further, we held that:

> With respect to application of dual accounting prior to August 1, 1977, we find that the rule represents a departure from well established practice in the Department. While the Issue Paper [2/] is discounted by MMS on appeal as a nonbinding internal memorandum which did not constitute a rule, it appears from the record that this did reflect the longstanding policy of the Department. Regardless of the questionable status of the Issue Paper after publication of NTL-1A, it was not an unreasonable interpretation of the lease terms and the contemporaneous regulations regarding calculation of royalty on Indian leases. It appears from the record that Appellants relied upon the former practice and that retroactive application of the dual accounting rule represents a very significant burden upon Appellants. Although the statutory interest in protecting the rights of Indians weighs in favor of retroactive application, we find that this factor is outweighed by the reliance which Appellants placed on the Department's policy and the burden associated with applying the rule retroactively prior to the effective date of NTL-1A provisions requiring dual accounting. While the trust responsibility of the Secretary guides the interpretation of the lease terms, this does not abrogate the rights of the lessees. See Woods Petroleum Corp. v. Department of the Interior, [47 F.3d 1032 (10th Cir. 1995)].

143 IBLA at 53.

2/ "Issue Paper on Dual Accounting," approved January 17, 1985, by the Associate Director for Royalty Management, MMS. (Ex. 2 to Petition.)

Petitioners contend that the Board erred in finding August 1, 1977, to be the appropriate cut-off date in precluding retroactive application of the dual accounting requirement. Petitioners argue that it was the policy of this Department for eight years after publication of NTL-1A not to require a dual accounting in the circumstances involved in this case, i.e., when wet gas was sold at the wellhead under an arm's-length contract and the operator had no ownership interest in the plant where the components were separated. In support, Petitioners cite the 1985 MMS Issue Paper on dual accounting. Rather, Petitioners contend that the proper cut-off date for retroactive application of the dual accounting requirement is January 23, 1986, the date of the court decision in Apache Tribe v. Supron Energy Co., 782 F.2d 855 (10th Cir. 1986) (Supron II) (dissent adopted on rehrg. en banc), overruling, Supron I, 728 F.2d 1555, modified, 793 F.2d 1171, cert. denied, 479 U.S. 970 (1986).

Intervenor has filed an Answer to the Petition for Reconsideration. The Petition is opposed by intervenor asserting that the date when the Department abandoned its prior policy of not requiring a dual accounting is irrelevant "in the face of valid regulations and lease terms and a federal court of appeals decision requiring dual accounting." Intervenor asserts that the Department is bound by its regulations regardless of contrary policies. Further, intervenor contends that the MMS orders should have been upheld back to 1970, as the orders provided, in view of the Department's regulations, the lease terms, and the fiduciary duty of the Department to the Tribe. Intervenor argues that in fact dual accounting was required by regulations in effect prior to promulgation of NTL-1A in 1977 and, hence, the MMS orders should be upheld back to 1970 as the lease terms and regulations were applied retroactively by the court in Supron.

Petitioners have filed a Reply asserting that NTL-1A was never published in draft form subject to public comment and, hence, was not a rule promulgated pursuant to notice and comment rulemaking provisions of the Administrative Procedure Act (APA). 5 U.S.C. § 553 (1994). Further, petitioners argue that before NTL-1A went into effect, the Department promulgated NTL-5, a "comprehensive APA rule" regarding valuation for royalty purposes of natural gas produced from Federal and Indian onshore oil and gas leases which did not require dual accounting.

Subsequent to receipt of petitioner's Reply, MMS and intervenor have filed a notice of supplemental authority in the form of a very recent Federal court decision addressing the issue of retroactive application of the dual accounting requirement.

Burlington Resources Oil and Gas Company v. U.S. Department of the Interior, No. 96-1936 (D.D.C. July 16, 1998). Intervenors note that this case arose in a different forum than the appeals before us because the final administrative decision for the Department of the Interior in that case was signed by the Assistant Secretary, depriving this Board of jurisdiction over any administrative appeal and causing the decision to be subject to immediate judicial review. Blue Star, Inc., 41 IBLA 333 (1979).

In the Burlington case, after rejecting lessee's challenge to the dual accounting requirement upheld by the Supron decision 3/ the court found that:

> Whether or not dual accounting may be retroactively imposed, however, was not specifically addressed in the Supron litigation. While the Tenth Circuit did order the lessees to dual account retroactively to 1970, there is no evidence of record that the issue was "actually litigated" in that case.

(Slip op. at 11.) In addressing that issue, the Burlington court rejected lessee's contention that the action of MMS in issuing a 1990 order requiring a dual accounting from 1970 constituted a retroactive imposition of new rules through adjudication. Id. Finding that the situation where an administrative agency retroactively applies a judicial decision such as Supron is properly distinguished from the retroactive application of its own administrative adjudication, the court held that the Department was required to retroactively implement the Tenth Circuit ruling that dual accounting had always been required of lessees on Indian lands. Id. at 11-12.

The Board's decision in this case was issued prior to the court's decision in Burlington. In the absence of a prior ruling on the issue of retroactive application of dual accounting, we analyzed the issue and reached a different conclusion than the court. While the Petition for Reconsideration has been pending before us in this case, a court on judicial review has upheld the

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3/ In Burlington the lessee asserted that the rationale of Supron had been undercut by a subsequent decision of the Supreme Court, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), and of the D.C. Circuit, Independent Petroleum Ass'n of America v. Babbitt, 92 F.3d 1248 (D.C. Cir. 1996). This argument was also made by appellants in the appeals before us.

order of the Department requiring retroactive application of dual accounting to 1970. We find this precedent controls our disposition of this case on reconsideration. Accordingly, we grant the Petition for Reconsideration, vacate our decision in this case in part to the extent it reverses the decisions appealed from, and affirm the decisions of the Deputy Commissioner of Indian Affairs. 4/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Petition for Reconsideration is granted, the Board's prior decision in this matter is vacated in part, and the decisions of the Deputy Commissioner of Indian Affairs are affirmed.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge

4/ In view of our ruling, we find it unnecessary to address petitioner's contention that NTL-1A is not a binding rule because it was not promulgated in accordance with APA notice and comment procedures.

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